

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE BURLINGTON INSURANCE
COMPANY,

Plaintiff,

v.

WATERWAY RAINSCREEN LLC, a
Washington limited liability company; and
JOHN URAL, an individual,

Defendant.

Case No. 2:19-cv-00033

**COMPLAINT FOR
DECLARATORY JUDGMENT**

The Burlington Insurance Company, for its complaint against Defendants Waterway Rainscreen LLC and John Ural alleges as follows:

I. NATURE OF ACTION

1. The Burlington Insurance Company seeks a declaration that an insurance policy it issued to defendant Waterway Rainscreen, LLC does not provide defense or indemnity coverage to either Named Insured Waterway Rainscreen LLC or its principal John Ural with respect to a lawsuit filed against them.

II. PARTIES

2. The Burlington Insurance Company ("TBIC") is a North Carolina corporation with its principal place of business in Hartford, Connecticut.

3. Upon information and belief, Waterway Rainscreen LLC ("Waterway Rainscreen") was a Washington limited liability company.

10. The Complaint contains claims against Waterway Rainscreen and Ural for Breach of Contract, Tortious Interference with Business Expectancy, Trade Name Infringement, and Consumer Protection Act Violations.

11. On or about January 12, 2018, counsel for Waterway Rainscreen and Ural tendered the Complaint in the Underlying Lawsuit to TBIC.

12. TBIC denied that the Complaint in the Underlying Action alleged any claims potentially covered under the Policy, but nevertheless agreed to defend Waterway Rainscreen and Ural under a full reservation of rights, and has been defending them in the Underlying Lawsuit.

13. On September 17, 2018, Stuc-O-Flex filed its First Amended Complaint in the Underlying Lawsuit.

14. The First Amended Complaint added an additional party, Pacific West Industries, Inc., as a defendant in the Underlying Lawsuit. The First Amended Complaint contains claims against Waterway Rainscreen and Ural for Breach of Contract, Tortious Interference with Business Expectancy, Trademark Violation, Consumer Protection Act Violations, and a claim for Alter Ego/Piercing the Corporate Veil.

15. TBIC has continued to defend Waterway Rainscreen and Ural under a full reservation of rights.

16. On September 20, 2018, the Underlying Lawsuit was removed to the Western District of Washington (Seattle) and assigned case number 2:18-cv-01386-RAJ.

V. THE INSURANCE POLICY

17. Waterway Rainscreen is the Named Insured under TBIC commercial general liability policy no. 361BW33554, with a policy period of October 28, 2015 to October 28, 2016 (the "Policy").

18. Subject to its terms, conditions, limitations, and exclusions, the Policy provides the following relevant policy language related to Coverage A, Bodily Injury and Property Damage:

SECTION I – COVERAGES

**COVERAGE A BODILY INJURY AND PROPERTY
DAMAGE LIABILITY**

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to “bodily injury” and “property damage” only if:

(1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;

(2) The “bodily injury” or “property damage” occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or

after the policy period will be deemed to have been known prior to the policy period.

c. “Bodily injury” or “property damage” which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim, includes any continuation, change or resumption of that “bodily injury” or “property damage” after the end of the policy period.

d. “Bodily injury” or “property damage” will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II – Who Is An Insured or any “employee” authorized by you to give or receive notice of an “occurrence” or claim:

(1) Reports all, or any part, of the “bodily injury” or “property damage” to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the “bodily injury” or “property damage”; or

(3) Becomes aware by any other means that “bodily injury” or “property damage” has occurred or has begun to occur.

e. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury”.

19. The Coverage A – Bodily Injury and Property Damage Liability contains the following relevant exclusions:

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. This

exclusion does not apply to “bodily injury” resulting from the use of reasonable force to protect person or property.

k. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

l. Damage To Your Work

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

m. Damage To Impaired Property Or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

(1) A defect, deficiency, in adequacy or dangerous condition in “your product: or “your work”; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms. This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

o. Personal And Advertising Injury

“Bodily injury” arising out of “personal and advertising injury”.

20. The Coverage A – Bodily Injury and Property Damage Liability contains the following relevant definitions:

3. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

1 8. "Impaired Property" means tangible property, other than
2 "your product" or "your work", that cannot be used or is less
3 useful because:

4 a. It incorporates "your product" or "your work" that is
5 known or thought to be defective, deficient, inadequate or
6 dangerous; or

7 b. You have failed to fulfill the terms of a contract or
8 agreement; if such property can be restored to use by the
9 repair, replacement, adjustment or removal of "your
10 product" or "your work" or your fulfilling the terms of the
11 contract agreement.

12 *****

13 13. "Occurrence" means an accident, including continuous or
14 repeated exposure to substantially the same general harmful
15 conditions.

16 *****

17 17. "Property damage" means:

18 a. Physical injury to tangible property, including all
19 resulting loss of use of that property. All such loss of use
20 shall be deemed to occur at the time of the physical injury
21 that caused it; or

22 b. Loss of use of tangible property that is not physically
23 injured. All such loss of use shall be deemed to occur at
24 the time of the "occurrence" that caused it.

25 *****

26 21. "Your Product"

27 a. Means:

(1) Any goods or products other than real
property, manufactured, sold, handled, distributed
or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. “Your Work”

a. Means:

(1) Work or operations performed by your or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and

(2) The providing of or failure to provide warnings or instructions.

21. Subject to its terms, conditions, limitations, and exclusions, the Policy provides the following relevant policy language related to Coverage B, Personal and Advertising Injury Liability:

COVERAGE B- PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which this insurance applies.

We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “personal and advertising injury” to which this insurance does not apply.

b. This insurance applies to “personal and advertising injury” caused by an offense arising out of your business but only if the offense was committed in the “coverage territory” during the policy period.

22. The Coverage B – Personal and Advertising Injury Liability contains the following relevant exclusions:

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

“Personal and advertising injury” caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict “personal and advertising injury”.

c. Material Published Prior to the Policy Period

“Personal and advertising injury” arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

e. Contractual Liability

“Personal and advertising injury: for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach of Contract

“Personal and advertising injury” arising out of a breach of contract, except an implied contract to use another’s advertising idea in your “advertisement”.

g. Quality Or Performance of Goods-Failure To Conform To Statements

“Personal and advertising injury” arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your “advertisement”.

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

“Personal and advertising injury” arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another’s advertising idea in your “advertisement”.

However, this exclusion does not apply to infringement, in your “advertisement”, of copyright, trade dress or slogan.

l. Unauthorized Use of Another’s Name or Product

“Personal and advertising injury” arising out of the unauthorized use of another’s name or product in your e-mail, domain name or metatag, or any other similar tactics to mislead another’s potential customers.

23. The Coverage B – Personal and Advertising Injury Liability contains the following relevant definitions:

1. “Advertisement” means a notice that is broadcast or published to the general public or specific market segments about your goods, products, or services for the purpose of attracting customer or supporters. For the purpose of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communications; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

14. “Personal and advertising injury” means injury, including consequential “bodily injury”, arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord, or lessor;
- d. Oral or written publication, in any manner, or material that slanders or libels a person or organization or disparages a person's or organization's goods, product or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

24. The Policy contains an Intellectual Property exclusion that applies to both Coverage A and B and states, in relevant part:

**THIS ENDORSEMENT CHANGES THE POLICY.
PLEASE READ IT CAREFULLY.**

EXCLUSION - INTELLECTUAL PROPERTY

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE
PART PRODUCTS/COMPLETED OPERATIONS
LIABILITY COVERAGE PART**

A. Paragraph D. of this endorsement is added to 2. Exclusions of Section I - Coverage A - Bodily Injury and Property Damage Liability under the Products/Completed Operations Liability Coverage Form.

B. Paragraph D. of this endorsement is added to 2. Exclusions of Section I - Coverage A - Bodily Injury and Property Damage Liability under the Commercial General Liability Coverage Form.

C. Paragraph D. of this endorsement is added to 2. Exclusions of Section I - Coverage B - Personal and Advertising Injury Liability under the Commercial General Liability Coverage Form.

1 D. This insurance does not apply to claims for “any injury or
2 damage” that results from the actual or alleged infringement or
3 violation of any intellectual property rights or laws, including but
4 not limited to:

- 5 1. Copyright;
- 6 2. Patent;
- 7 3. Trade dress;
- 8 4. Trade name;
- 9 5. Trade secret; or
- 10 6. Trademark.

11 E. The following definition is added:

12 For the purposes of this endorsement, “any injury or damage”
13 means any injury or damage covered under any Coverage Part to
14 which this endorsement is applicable, and includes “bodily
15 injury”, “property damage” or “personal and advertising injury”
16 as defined in the applicable Coverage Part.

17 **FIRST CLAIM FOR RELIEF**

18 (Declaratory Judgment – No Duty to Defend)

19 25. TBIC re-alleges the allegations of paragraphs 1 through 24 as if fully set forth
20 herein.

21 26. There is an actual controversy between TBIC and Waterway Rainscreen and
22 Ural involving the claim to coverage by Waterway Rainscreen and Ural for the claims alleged
23 in the Underlying Lawsuit.

24 27. TBIC requests a declaratory judgment that based on the terms, conditions,
25 limitations, and exclusions of the Policy, and the fact that based upon the evidence in the
26 Underlying Lawsuit the Policy does not provide coverage for indemnity, TBIC does not have
27 any ongoing obligation to defend Waterway Rainscreen or Ural in the Underlying Lawsuit.

28 **SECOND CLAIM FOR RELIEF**

(Declaratory Judgment – No Duty to Indemnify)

29 28. TBIC re-alleges the allegations of paragraphs 1 through 27 as if fully set forth

herein.

29. TBIC requests a declaratory judgment that based on the terms, conditions, limitations, and exclusions of the Policy and the evidence in the Underlying Lawsuit, TBIC does not have any obligation to indemnify Waterway Rainscreen or Ural for the damages sought in the Underlying Lawsuit.

PRAYER FOR RELIEF

WHEREFORE, TBIC prays for judgment as follows:

1. For a declaration that TBIC does not currently have, and never had, any obligation to defend Waterway Rainscreen and John Ural in the Underlying Lawsuit.
2. For a declaration that TBIC does not currently have and can never have any obligation to indemnify Waterway Rainscreen and John Ural in the Underlying Lawsuit.
3. Awarding TBIC costs and disbursements that are recoverable by law.
4. Awarding TBIC such other and further relief as the Court may deem just and appropriate.

DATED this 9th day of January, 2019.

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